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Supreme Court of the United States

OCTOBER TERM, 1949

No. 186

CITY OF DALLAS,

Petitioner,

v.

D. W. RENTZEL, CIVIL AERONAUTICS ADMINISTRATOR, DEPARTMENT OF COMMERCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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D. W. RENTZEL, CIVIL AERONAUTICS ADMINISTRATOR, DEPARTMENT OF COMMERCE,

Respondent.

PETITION FOR A WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

City of Dallas, Petitioner herein, presents herewith its Petition for Writ of Certiorari, and respectfully shows:

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The City of Dallas filed a Petition in the United States Court of Appeals for the Fifth Circuit, against D. W. Rentzel, Civil Aeronautics Administrator, Department of Commerce, to review the Order overruling the Protest of the City of Dallas against the development of the Midway

Airport in Tarrant County under the following circumstances:

The City of Dallas owns Love Field, a Class 4 airport, in Dallas, Texas, and the Civil Aeronautics Administrator in February, 1948, announced that Midway Airport, upon application of the City of Fort Worth, would be developed some twelve (12) miles from the City of Dallas' Airport, Love Field, in Tarrant County, and that this Airport would serve both the City of Dallas and the City of Fort Worth, and that Love Field would be relegated, or given a secondary standing, or be an auxiliary airport to the Midway Airport. The City of Dallas filed its Petition, requesting a Hearing under Section 9(e) of the Federal Airport Act. (Public Law No. 377-79th Congress, Second Session.) A so-called Hearing was granted to the City of Dallas in Austin, Texas, on April 23, 1948, but the City of Dallas was denied the right to cross-examine any of the witnesses appearing in favor of the development of such airport, and thus the City of Dallas was denied its constitutional right to a fair, public Hearing, such as is guaranteed to it by the Airport Act, the common law and the Constitution.

The Respondent filed a Motion to Dismiss the Petition for Review in the United States Court of Appeals, Fifth Circuit, on the grounds: (a) That the Circuit Court has no jurisdiction to review the orders of the Civil Aeronautics Administrator; and (b) That the Orders of the Administrator in this matter are final and not subject to judicial review in any Court.

The United States Court of Appeals, Fifth Circuit, handed down an Opinion, holding that the Orders of the Civil Aeronautics Administrator, Respondent herein, were not subject to review in the United States Court of Appeals and did not pass on the question of whether or not the Administrator's Orders were subject to review under the Federal Administrative Procedure Act in any other Court. City of Dallas v. D. W. Rentzel, 172 Fed. (2d) 122.

The Petition for Rehearing filed by the City of Dallas was overruled by the United States Court of Appeals on April 14, 1949.

II.

STATEMENT DISCLOSING THE BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS.

Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 [Title 28 U. S. C., Section 347(a) and which in the 1948 revision of Title 28 U. S. C. is Section 1254] is the statutory authority for this Honorable Court to exercise its jurisdiction in this case, by requiring that it be certified to this Court for determination and the correct interpretation of the statutes involved insofar as the review of the Orders of the Civil Aeronautics Administrator are concerned.

It is submitted that this is a case which this Court should supervise by granting a Writ of Certiorari, *since this is a case of first impression*, calling in question the provisions of the Federal Airport Act, Section 1, et seq., 49 U. S. C. A.,

Section 1101, et seq.; Civil Aeronautics Act of 1938, Sections 309 and 1001a as amended; 49 U. S. C. A., Sections 459 and 646a; Administrative Procedure Act, Sections 1 to 12-10, 5 U. S. C. A., Sections 1001-1011, 1009; insofar as they apply to the review of: (a) The Orders of the Civil Aeronautics Administrator; and (b) The jurisdiction of the United States Court of Appeals to review such Orders.

On February 1, 1949, the United States Court of Appeals for the Fifth Circuit dismissed the Petition for Review and on April 14, 1949, overruled the Petition for Rehearing, which had been filed by the Petitioner on the 16th day of February, A. D. 1949, and this Petition for Writ of Certiorari is applied for within ninety (90) days from the final action of the United States Court of Appeals, Fifth Circuit. (28 U. S. C., Sec. 2101.)

III.

QUESTIONS PRESENTED

(1) Whether Sections 309 and 1006 of the Civil Aeronautics Act of 1938, confer jurisdiction on the United States Court of Appeals to review the Orders of the Administrator of Civil Aeronautics in cases where he is required to give a public Hearing.

(2) Whether a Hearing, without the right of cross-examination, under Section 9(e) of the Federal Airport Act satisfies the due process of law to a litigant.

(3) Whether the United States Court of Appeals erred in refusing to review the Orders of the Administrator upon Petition of the City of Dallas, since the record discloses

that the City of Dallas was not given a full fair Hearing as provided under Section 9(e) of the Federal Airport Act in that it was denied the right of cross-examination.

(4) Whether or not the United States Court of Appeals erred in refusing to review the Orders of the Civil Aeronautics Administrator on the Petition of the City of Dallas, since it is quite apparent that the Civil Aeronautics Administrator and the Civil Aeronautics Board are two independent agencies of equal dignity, and under Section 303 of the Civil Aeronautics Act the Administrator is required to confer with the Civil Aeronautics Board as to the location of any airports to be developed with Federal funds other than military installations and, therefore, the resulting decision of the Administrator is of equal dignity to that of the Civil Aeronautics Board.

(5) Whether or not the Order of the Civil Aeronautics Administrator, overruling the Protest of the City of Dallas became reviewable when Public Law No. 872, as passed by the 80th Congress, became effective on July 1, 1948, and which made certain orders of the Administrator subject to review in the same manner as those of the Civil Aeronautics Board and particularly under Section 309 of the Civil Aeronautics Act.

(6) Whether or not the Order of the Administrator is subject to review in the Court of Appeals under Section 1009 of the Administrative Procedure Act (5 U. S. C. A.) passed by the 79th Congress.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

(1) Under Section 9(e) of the Federal Airport Act it is provided, among other things, that a municipal corporation, such as the City of Dallas has the right to be heard upon *the proposed development and location of an airport* to be improved with Federal funds, either for or against. The City of Dallas availed itself of this opportunity by timely filing a Petition for such a Hearing before the Civil Aeronautics Administrator, who designated two (2) Examiners to conduct such a Hearing in Austin, Texas, on April 23, 1948. The Hearing was convened and before any testimony was taken, the Examiners informed the City of Dallas that no cross-examination of witnesses would be allowed, to which ruling the City of Dallas excepted and insisted upon the right of cross-examination, which was denied. The City of Dallas proceeded to participate in such Hearing subject to its objection and exception as above indicated. A "Hearing" without cross-examination is not such a Hearing as is contemplated by law and the Constitution of the United States.

(2) Since Section 303 of the Civil Aeronautics Act of 1938 requires that the Administrator consult with the Civil Aeronautics Board *as to the location and development* of airports other than military installations, it necessarily follows that the orders of the Administrator are of the same dignity as those of the Civil Aeronautics Board whose orders in turn are expressly subject to review upon Petition

of the aggrieved party, either in: (a) The United States Court of Appeals for the District of Columbia; or (b) in the United States Court of Appeals in which Circuit the complaining party resides.

(3) The claim that Respondent's orders are not subject to review in any Court is incompatible with reason, when it is considered that: (a) The Administrator is charged with the duty of planning and developing airports (non-military) at Federal expense; and (b) The Civil Aeronautics Board is charged with the duty of determining what carriers will use the airports and in making such determination, the orders of the Civil Aeronautics Board are expressly reviewable by the Courts of Appeals upon Petition, thus, leaving the impression that although the two agencies are of equal dignity one can function with unbridled discretion or even corruptly and not within the reach of the Courts; whereas the other is subject to such legal review as is provided by Sections 308 and 1006 of the Civil Aeronautics Act as amended.

(4) The United States Court of Appeals erred in refusing to decide the question of whether or not the Orders of the Civil Aeronautics Administrator are reviewable under the Federal Administrative Procedure Act particularly Section 1009, in the United States Court of Appeals, because it seems incongruous to say that the orders of the Civil Aeronautics Administrator would be reviewable by a Court of original jurisdiction such as a Federal District Court and the orders of the Civil Aeronautics Board, an agency of equal dignity with the Civil Aero-

nautics Administration, would be subject to review only in the United States Court of Appeals.

Petitioner files herewith certified transcript of the record, including the proceedings in the United States Court of Appeals below.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari may issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court on a day certain, to be therein designated a full and complete transcript of the record and all proceedings in the cause entitled City of Dallas, Petitioner v. D. W. Rentzel, Civil Aeronautics Administrator, Department of Commerce Respondent, No. 12515 on the docket of said Court to the end that the case may be reviewed and determined by this Court as provided by law, that the judgment of the United States Court of Appeals may be reviewed and that your Petitioner may have such other and further relief and remedy as this Court may deem appropriate and in conformity with law.

Respectfully submitted,

H. P. KUCERA,
402 City Hall,
Dallas 1, Texas,
Attorney for Petitioner,
City of Dallas, Texas.

Dated: July 7, 1949

Supreme Court of the United States

OCTOBER TERM, 1949

No.....

CITY OF DALLAS,

Petitioner,

v.

D. W. RENTZEL, CIVIL AERONAUTICS ADMINISTRATOR, DEPARTMENT OF COMMERCE,

Respondent.

BRIEF IN SUPPORT OF PETITION

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL GROUNDS

On February 1, 1949, the United States Court of Appeals for the Fifth Circuit dismissed the Petition for Review and on April 14, 1949, overruled the Petition for Rehearing, which had been filed by the Petitioner on the 16th day of February, A. D. 1949, and this Petition for Writ of Certiorari is applied for within ninety (90) days from the final action of the United States Court of Appeals, Fifth Circuit. (28 U. S. C., Sec. 2101.)

Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 [Title 28 U. S. C., Section 347(a), and which in the 1948 revision of Title 28 U. S. C.

is Section 1254] is the statutory authority for this Honorable Court to exercise its jurisdiction in this case, by requiring that it be certified to this Court for determination and the correct interpretation of the statutes involved insofar as the review of the Orders of the Civil Aeronautics Administrator are concerned.

It is submitted that this is a case which this Court should supervise by granting a Writ of Certiorari, *since this is a case of first impression*, calling in question the provisions of the Federal Airport Act, Sec. 1, et seq., 49 U. S. C. A., Sec. 1101, et seq.; Civil Aeronautics Act of 1938, Sections 309 and 1001a as amended; 49 U. S. C. A., Sections 459 and 646a; Administrative Procedure Act, Sections 1 to 12-10, 5 U. S. C. A., Sections 1001-1011, 1009, insofar as they apply to the review of: (a) The Orders of the Civil Aeronautics Administrator; and (b) The jurisdiction of the United States Court of Appeals to review such Orders.

STATEMENT OF THE CASE

The City of Dallas filed a Petition in the United States Court of Appeals for the Fifth Circuit, against D. W. Rentzel, Civil Aeronautics Administrator, Department of Commerce, to review the Order overruling the Protest of the City of Dallas against the development of the Midway Airport in Tarrant County under the following circumstances:

The City of Dallas owns Love Field, a Class 4 airport, in Dallas, Texas, and the Civil Aeronautics Administrator in February, 1948, announced that Midway Airport, upon

application of the City of Fort Worth, would be developed some twelve (12) miles from the City of Dallas' Airport, Love Field, in Tarrant County, and that this Airport would serve both the City of Dallas and the City of Fort Worth, and that Love Field would be relegated, or given a secondary standing, or be an auxiliary airport to the Midway Airport. The City of Dallas filed its Petition, requesting a Hearing under Section 9(e) of the Federal Airport Act. *(Public Law* No. 377-79th Congress, Second Session.) A so-called Hearing was granted to the City of Dallas in Austin, Texas, on April 23, 1948, but the City of Dallas was denied the right to cross-examine any of the witnesses appearing in favor of the development of such airport, and thus the City of Dallas was denied its constitutional right to a fair, public Hearing, such as is guaranteed to it by the Airport Act, the common law and the Constitution.

The Respondent filed a Motion to Dismiss the Petition for Review in the United States Court of Appeals, Fifth Circuit, on the grounds: (a) That the Circuit Court has no jurisdiction to review the orders of the Civil Aeronautics Administrator; and (b) That the orders of the Administrator in this matter are final and not subject to judicial review in any Court.

The United States Court of Appeals, Fifth Circuit, handed down an Opinion, holding that the Orders of the Civil Aeronautics Administrator, Respondent herein, were not subject to review in the United States Court of Appeals and did not pass on the question of whether or not the Administrator's Orders were subject to review under the

Federal Administrative Procedure Act in any Court. *City of Dallas v. D. W. Rentzel*, 172 F. (2d) 122.

SPECIFICATION OF ERRORS RELIED UPON

(1) The Orders of the Civil Aeronautics Administrator are subject to review by the United States Court of Appeals under Sections 309 and 1006 of the Civil Aeronautics Act of 1938. (Petition for Rehearing, pp. 1-2; Assignment of Error No. 1.)

(2) The Orders of the Civil Aeronautics Administrator are reviewable by Petition to the United States Court of Appeals because under Section 303 of the Civil Aeronautics Act the *Administrator is required to confer with the Civil Aeronautics Board as to the location and development of any airport* (except military) to be developed with Federal funds and, therefore, the resulting decision of the Administrator is of equal dignity to that of the Civil Aeronautics Board whose orders are made expressly subject to review by statute. (Petition for Rehearing, p. 3; Assignment of Error No. 4.)

(3) The Orders of the Civil Aeronautics Administrator are subject to review by the United States Court of Appeals under Public Law No. 872, as passed by the 80th Congress, and which became effective July 1, 1948, since under that law certain orders of the Administrator are subject to review in the same manner as those of the Civil Aeronautics Board and particularly under Section 309 of the Civil Aeronautics Act. (Petition for Rehearing, p. 3; Assignments of Error Nos. 5, 6 and 7.)

(4) The Orders of the Civil Aeronautics Administrator are subject to review by the United States Court of Appeals because under Section 9(e) of the Federal Airport Act, the City of Dallas was entitled to, and was granted a Hearing as a matter of statutory right, but at such "so-called Hearing" the City of Dallas was denied the right to cross-examination of the witnesses, and was thereby denied due process of law. (Petition for Rehearing, p. 2; Assignment of Error No. 3.)

(5) The Orders of the Civil Aeronautics Administrator are subject to review by the United States Court of Appeals under Section 1009 of the Administrative Procedure Act (5 U. S. C. A.) passed by the 79th Congress. (Petition for Rehearing, p. 2; Assignment of Error No. 2.)

ARGUMENT UNDER SPECIFICATION OF ERRORS NO. 1 TO NO. 3, INCLUSIVE

The Respondent's claim *that the acts of the Administrator are not subject to judicial review* arises from the fact that the Administrator says that he has nothing to do with the *ordering of traffic from one port to another.* This power and duty he says rests with the Civil Aeronautics Board. (See Footnote page 12 of Respondent's Brief, in the work below.) The Administrator contends that his job is to *build airports and the job of the Civil Aeronautics Board is to find somebody to use them and that the City of Dallas should not complain until it is hurt, and that is, when the traffic is ordered from Love Field to the Midway Airport* and that then the City of Dallas will have the right to a judicial review of the Board's Order under Section

1006, Subdivision (a) of the Civil Aeronautics Act. Section 1006, Subdivision (a) reads as follows:

"Orders of Board Subject to Review

"Sec. 1006 (49 U. S. Code 646.) (a). Any Order, affirmative or negative, issued by the Board under this Act, except any order in respect to any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

The Civil Aeronautics Act, Section 303, provides that no Federal funds shall be expended other than for military purposes (whether or not in coöperation with the State or local governmental agencies) for the acquisition, establishment, construction * * * or any landing area, etc., *except upon written recommendation and certification by the Administrator made after consultation with the Authority (Board) that such landing area or facility is reasonable and necessary for use in air commerce or in the interest of National Defense.* How then does the Administrator justify his position that it is his job to build the airports and that he has nothing to do with the transferring of traffic thereto when the Act requires that he must consult with the Civil Aeronautics Board *about the necessity for the landing area or airport?* Does it not follow that if the *Board must be consulted under Section 303 of the*

Civil Aeronautics Act then it must give approval to the site and location and need for it? If the Administrator did what the law required him to do when he approved the application of Fort Worth for the development of the Midway Airport, that is consult, with the Board, *then his Order had the same dignity as that of the Board and as such* is subject to judicial review under Section 1006 of the Civil Aeronautics Act.

The question then can be asked. Does the Administrator contend that he has power to build airports wherever his whim or fancy may lead him with the hope *that someone can be found, or forced, to use the facilities after the port has been built?* Does the Administrator contend that the Congress has given him such powers? To charge Congress with such an indiscretion, we believe, would be unfair. However, if the Airport Act and the Civil Aeronautics Act are read together, we believe the picture becomes more clear. The inevitable conclusion follows that the acts and determinations of the Administrator in connection with the development of Class 4 Airports, which requires that he grant a hearing to the interested parties, are subject to judicial review, otherwise, the Congress would not have required that a hearing be held. Otherwise, Ceasar could exercise his discretion to his wildest fancy. If the Congress had so intended, we believe it would have said so.

Let us now examine the effect of Section 309 of the Civil Aeronautics Act of 1938, as amended July 1, 1948, which reads as follows:

> "Section 309. In the conduct of any public hearings or investigations authorized by this Act or by the Fed-

> eral Airport Act, the Administrator or any duly designated examiner shall have the same powers to take evidence, issue subpoenas, take depositions, and compel testimony as are vested in members of the Board and its duly designated examiners by Section 1004 of this Act. Actions of the Administrator or his examiners in such cases shall be governed by the procedures specified in Section 1004, and be enforced in the manner provided therein."

When Section 308 of the Civil Aeronautics Act is studied, the purpose of Section 309 as enacted by the 80th Congress and which became effective July 1, 1948, becomes more apparent. It is believed that Section 309 merely clarifies the procedure which the Administrator was required to follow even prior to the enactment of Section 309. What else could it mean when we consider what Section 308 provides for? What hearings does it have reference to? We believe the answer is found in Section 9(e) of the Airport Act and that Section 309 was enacted by the Congress merely as a matter of clarification and that likewise the Orders of the Administrator with reference to the subject matter covered by Section 9(e) of the Airport Act have been subject to review prior to said Act and that they continue to be so.

It is, however, insisted by the Respondent that since Section 309 as amended, became effective on July 1, and the determination of the Administrator being made on June 30, 1948, just one day before, that it does not inure to the benefit of the Petitioner. We beg to call the Court's attention to the fact that the determination was made on June 30, 1948 in Washington, but, according to the record,

the City of Dallas did not receive notice thereof until about July 5, 1948. *The City of Dallas filed its Motion for Reconsideration, together with exceptions to the findings of the Examiners. This Motion and exceptions were not overruled by the Administrator until August 12, 1948, all of which appears in Exhibit "C"*, page 33, of the Petition for Review. The Motion for Reconsideration and its overruling extended the time for the Petitioner to file its Petition for Review and made the Amendment of July 1, 1948, available to the City of Dallas. *Saginaw Broadcasting Co. v. Federal Communications Commission*, 68 App. D. C. 282, 286, 287, 96 F. (2d) 554; *Southland Industries, Inc. v. Federal Communications Commission*, 69 App. D. C. 82, 99 F. (2d) 117; *Braniff Airways, Inc. v. Civil Aeronautics Board*, 79 App. D. C. 341, 147 F. (2d) 152.

When the Order of the Administrator was made final on August 12, 1948, the amendatory language of Section 309 of the 1938 Act, as amended, effective July 1, 1948, was then in full force and effect. It became applicable and available to the City of Dallas. Assuming, however, that on June 30, 1948, the above Section did not permit the review, which we do not admit, the law giving redress, which became effective the next day must be given consideration. It does not involve a penal statute. In the case of *Carter v. Bull*, 1 L. Ed. 648, the U. S. Supreme Court upheld a remedial act of the Legislature of the State of Connecticut under these circumstances. The Legislature of Connecticut in May, 1795, passed a law or resolution which had the effect of vacating a decree of a probate court heretofore entered on March 21, 1793. Under the then existing law in

1793 there was no appeal from the decree provided by the judicial procedure of the State of Connecticut. Acting under this legislative enactment, the case was reopened and an entirely different result was reached by the Trial Court and the Supreme Court of Connecticut sustained the judgment and the validity of this law of 1795. The validity of this law was attacked on the grund that it was an ex post facto law such as was prohibited by the Federal Constitution. The Court, speaking through Justice Chase of the U. S. Supreme Court, held that since the subject matter involved dealt with civil rights and not any penal laws that the law was valid and did not impinge upon the Federal Constitution.

It occurs to us that since a remedial statute of a civil nature is involved, that if a remedy was opened by a new law one second (figuratively speaking) after the alleged adjudication of June 30, 1948, that such law became available to review such adjudication. However, we need not strain the construction to that extent, because the adjudication did not become final until August 12, 1948, as is evidenced by the Order of the Administrator under that date in which it is recited that the request for reconsideration of June 30th, is overruled.

Under Subdivision (b) of Section 1006 of the Civil Aeronautics Act the forum and venue of the reviewable action is provided for. The actions of the Administrator are reviewable by the U. S. Court of Appeals (U. S. Circuit Court) in the residence of the Petitioner, or in the District of Columbia. It is significant that the word "agency" is

used throughout this statute. Is not the Civil Aeronautics Administrator an "agency" of the Department of Commerce for the purpose of administering the Civil Aeronautics Act and to do certain duties under the Federal Airport Act? Can it be logically argued that such officer is beyond the process of the Court and his actions are not subject to some higher authority when those of his alleged superior—the Board, are subject to review? Again, when Section 308 is read in connection with Section 309 recently adopted, it becomes clear that its purpose was to clarify a procedure which he was required to follow even before its enactment.

What has been said above, we believe becomes quite apparent when the legislative history and experience which actuated the passage of the Amendment to the Civil Aeronautics Act as passed by the 80th Congress, Public Law No. 872, are considered, and the explanatory notes fully show that a review in the Court of Appeals was contemplated of the actions of the Administrator. Section 309 of the Civil Aeronautics Act as amended, reads as follows:

> "POWER TO CONDUCT HEARINGS AND INVESTIGATIONS
>
> "Sec. 309. In the conduct of any public hearings or investigations authorized by this Act or by the Federal Airport Act, the Administrator or any duly designated examiner shall have the same powers to take evidence, issue subpoenas, take depositions and compel testimony as are vested in members of the Board and its duly designated examiners by Section 1004 of this Act. Actions of the Administrator or his examiners in such cases shall be governed by the procedures specified in Section 1004, and be enforced in the manner provided therein."

Likewise, there was added Subsection (c) to Section 601 of the Civil Aeronautics Act by Public Law 872, Acts of the 80th Congress which reads as follows:

"DELEGATION OF AUTHORITY

"(c) The Civil Aeronautics Board, subject to such terms, conditions and limitations as the Board may specify, is empowered to delegate to the Administrator the power or authority to prescribe rules, regulations and standards under this title and to perform functions authorized under Section 702 of this Act 66. The Board may modify, suspend, revoke, or terminate such power or authority so delegated by it to the Administrator and may prescribe by rule and regulations such provisions and procedures for review of actions taken by the Administrator under authority delegated hereunder as it may deem necessary and appropriate in the public interest. Except as specifically provided in the rules and regulations of the Board, *the filing of a petition for review shall not excuse any person from complying with the action of the Administrator nor* operate in any manner to stay the enforcement of such action: Provided, That nothing in this subsection shall be construed as amending, modifying or repealing any provision of the Administrative Procedure Act." Approved July 1, 1948.

Now what kind of review is meant by this provision? Surely not a suit in the Federal District Court. The explanatory notes in connection with the Amendment contained in Public Law No. 872 as passed by the 80th Congress say that its purpose was to clarify certain doubts, and that the Civil Aeronautics Administration and the Civil Aeronautics Board are separate agencies in the Department of Commerce. Each acts within its sphere on matters of equal dignity and, therefore, they are necessarily

reviewable by the same type of tribunal, that is, a Court of Appeals. It does not seem reasonable, as contended by the Government, that the Administrator's acts are beyond reach of Court process insofar as review, and yet every order of the Civil Aeronautics Board is subject to review by the Court.

By reference to the legislative history of Public Law No. 872 as contained in House Report 2315, and published in U. S. Code Congressional Service, Volume 2, page 2259, we believe that the argument of the City of Dallas as to the meaning and purpose of Section 308 of the Civil Aeronautics Act is made quite clear. Public Law No. 872 is framed in four sections and Section 3 contains what is now Section 308 of the Civil Aeronautics Act. The legislative history in speaking of the purpose of Section 3 reads as follows:

"SECTION 3

"This section merely corrects an oversight which existed in Reorganization Plans III and IV by making it clear that the Administrator or his duly authorized examiners, has all the powers necessary to the proper conduct of formal hearings. The Civil Aeronautics Act of 1938, the Federal Airport Act, and Reorganization Plans III and IV make it clear that the Administrator is to perform certain acts which required the conduct of formal hearings. However, through some oversight under the terms of Reorganization Plans III and IV, the hearing powers contained in the Civil Aeronautics Act of 1938 were not expressly given to the Administrator. This section merely corrects this defect by removing any possible doubt *and making it clear that in all public hearings or investigations authorized by existing law, the Administrator is authorized to exercise all of the powers relative to the conduct of*

formal public hearing otherwise vested in the Board by the Civil Aeronautics Act of 1938, as amended." (Emphasis ours.)

Thus, it is quite apparent that the purpose of this Amendment was to clarify a doubt. The City of Dallas contends that since under the Airport Act and also the Aeronautics Act the Administration has certain formal hearings to hold, that in the conduct of these hearings he is bound by the recognized law as to what such hearing should consist of and that his determination based on formal hearings is not final, but is subject to review by the Court of Appeals.

ARGUMENT UNDER SPECIFICATION OF ERROR NO. 4

Under Section 9(e) of the Federal Airport Act it is provided as follows:

"HEARINGS

"(e). Project applications shall be matters of public record in the office of the Administrator. Any public agency, person, association, firm, or corporation having a substantial interest in the disposition of any application by the Administrator may file with the Administrator a memorandum in support of or in opposition to such application; and any such agency, person, association, firm, or corporation shall be accorded, upon request, *a public hearing with respect to the location of any airport the development of which is proposed.* The Administrator is authorized to prescribe regulations governing such public hearings, and such regulations may prescribe a reasonable time within which requests for public hearings shall be made and such other reasonable requirements as may be necessary to avoid undue delay in disposing of project applications." (Emphasis ours.)

The City of Dallas was accorded a so-called Hearing in Austin on April 23, 1948, but was denied the right to cross-examine witnesses. (See pages 3 to 6, inclusive, of Petitioner's Answer and Brief to Motion to Dismiss in the Court below.

That the City of Dallas was not accorded such a Hearing as is guaranteed to it by the laws and the Constitution, we believe, is demonstrated by the following cases:

Railroad Commission of the State of California v. Pacific Gas & Electric Company, 82 L. Ed. 319, at page 322;

Morgan v. United States, 80 L. Ed. 1288 at page 1295; and,

Ohio Bell Telephone Company v. Public Utilities Commission, 81 L. Ed. 1093, at page 1101.

Nor is the Administrator permitted to make a decision on evidence not introduced in the record. *Southern Railway Company v. Virginia*, 78 L. Ed. 260, at page 264.

Section 309 of the Civil Aeronautics Act confers the power to conduct hearings and investigations. It is true that this Act became effective on July 1, 1948, but Section 9(e) of the Federal Airport Act was in effect prior thereto and it required the Administrator to grant hearings such as are involved in this case.

Public Law No. 872, Acts of the 80th Congress, added to the Civil Aeronautics Act, Subsection (c) to Section 601,

and it will be noted that this Act provides in part as follows:

> "Except as specifically provided in the rules and regulations of the Board, *the filing of a petition for review shall not excuse any person from complying with the action of the Administrator* nor operate in any manner to stay the enforcement of such action: Provided, That nothing in this subsection shall be construed as amending, modifying, or repealing any provision of the Administrative Procedure Act."

Bearing in mind that Section 303 of the Civil Aeronautics Act requires the Administrator to consult with the Board (C. A. B.) with reference to the location and development of any airport (except military) it is quite apparent when such act is done, the order of the Administrator is of the same dignity as that of the Board and becomes reviewable in the same Court that the acts of the Civil Aeronautics Board are reviewable and that is, the Court of Appeals.

ARGUMENT UNDER SPECIFICATION OF ERROR NO. 5

The Court of Appeals [see Opinion City of Dallas v. Rentzel, 172 F. (2d) 122] states that the Court is not passing upon the question of whether or not the action of the Administrator is subject to review in any court under the Administrative Procedure Act, but merely says that the action of the Administrator is *not reviewable in a Court of Appeals*, leaving the impression that it is subject to review in a Federal District Court. There is nothing in Section 309 of the Civil Aeronautics Act or the Federal Air-

port Act which would indicate that the orders of the Administrator are not subject to review. However, since Section 9(e) of the Airport Act provides for a hearing it is of necessity, subject to review under the authority of *Griffin v. United States*, 303 U. S. 226 on the basic proposition that the Petitioner is entitled to a hearing such as the law provides, with the right of cross-examination. Then in what Court is it subject to review? It is the position of the Petitioner that it is subject to review in the Court of Appeals under the Administrative Procedure Act, and the last phrase of Subsection (c) of Section 601 of the Civil Aeronautics Act as added by Public Law No. 872, Acts of the 80th Congress, clearly so indicates. The Amendment harmonizes the Administrative Procedure Act with the Civil Aeronautics Act by saying that it does not repeal, modify or alter the Administrative Procedure, clearly meaning that the review of the acts of the Administrator will be by Petition in a Court of Appeals and not a District Court. This becomes clear by reference to the legislative history of Public Law No. 872 as contained in House Report 2315, and published in U. S. Code Congressional Service, Volume 2, page 2259. Public Law No. 872 is framed in four sections and Section 3 contains what is now Section 308 of the Civil Aeronautics Act. The legislative history in speaking of the purpose of Section 3 says as follows:

"SECTION 3

"This section merely corrects an oversight which existed in Reorganization Plans III and IV by making it clear that the Administrator or his duly authorized examiners, has all the powers necessary to the proper

conduct of formal hearings. The Civil Aeronautics Act of 1938, the Federal Airport Act, and Reorganization Plans III and IV make it clear that the Administrator is to perform certain acts which required the conduct of formal hearings. However, through some oversight, under the terms of Reorganization Plans III and IV, the hearing powers contained in the Civil Aeronautics Act of 1938 were not expressly given to the Administrator. This section merely corrects this defect by removing any possible doubt *and making it clear that in all public hearings or investigations authorized by existing law the Administrator is authorized to exercise all of the powers relative to the conduct of formal public hearings otherwise vested in the Board by the Civil Aeronautics Act of 1938, as amended.*" (Emphasis ours.)

That the Civil Aeronautics Administration or the Administrator is but an agency of the Department of Commerce in many respects on the same footing with the Civil Aeronautics Board, again becomes equally clear from reading the legislative history and the purpose of Subsection (c) which was added to Section 601 of the Civil Aeronautics Act of 1938 by Public Law No. 872. Throughout this legislative history the Administrator is referred to as an "agency" separated from that of the Civil Aeronautics Board, and both are persumably of equal dignity. Subsection (c) of Section 601 of the Civil Aeronautics Act as enacted by the 80th Congress, provides in part:

"Except as specifically provided in the rules and regulations of the Board, *the filing of a petition for review shall not excuse any person from complying with the action of the Administrator nor operate in any manner to stay the enforcement of such action:* Provided, That nothing in this subsection shall be

construed as amending, modifying or repealing any provision of the Administrative Procedure Act." (Emphasis ours.)

This history indicates that the acts of the Administrator have always been subject *to review by petition* and being an agency on the same level as the Civil Aeronautics Board, his decisions are subject to enforcement as provided in Section 1004 of the Civil Aeronautics Act, and shall "be enforced in the manner provided therein," has reference to the *whole subject of review*. The actions of the Administrator are subject to review in the same manner and in the same court as the actions of the Civil Aeronautics Board. This is logical reasoning because it would seem illogical to say that the actions of the Administrator are reviewable in a Federal District Court, whereas the actions of the Civil Aeronautics Board are reviewable in a Circuit Court.

It is, therefore, submitted that when the Airport Act is read together with the Civil Aeronautics Act, the conclusion is inescapable that in *matters where the Administrator is required to hold formal hearings, that his determination, judgment or order based upon such hearing is subject to review by petition just as the order of the Civil Aeronautics Board*, and the Court of Appeals (Circuit Court) in the Circuit where Petitioner resides, or the Court of Appeals for the District of Columbia has venue. This conclusion necessarily follows because it recognizes the equal rank, dignity or status of the Civil Aeronautics Administration and the Civil Aeronautics Board.

CONCLUSION

Petitioner respectfully prays that the accompanying Petition for Writ of Certiorari be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit dismissing the Petition for Review be reversed and the cause be remanded to that Court for further proceedings consistent with law.

Respectfully submitted,

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